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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1850

KELLY MARTEN and KATHY MARTEN,

Petitioners,

vs.

FRED S. THIES, Director of the San Bernardino County Department of Public Social Services,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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No. .....

KELLY MARTEN and KATHY MARTEN,

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vs.

FRED S. THIES, Director of the San Bernardino County Department of Public Social Services,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

The Petitioners, Kelly Marten and Kathy Marten, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in these proceedings on February 20, 1980, denying hearing on Petitioners' Appeal from the decision and opinion of the Court of Appeal of the State of California, Fourth Appellate District, Second Division, filed on November 29, 1979, and made final on December 29, 1979.

Opinion Below.

The opinion of the Court of Appeals of the State of California, Fourth Appellate District, Second Division, reported in the official reports as *Marten et al v. Thies*, 99 Cal. App. 3d 161, 160 Cal. Rptr. 57 (1979), appears in

Appendix II hereto and is labeled Exhibit "A". No opinion was rendered by the Supreme Court of the State of California except for memorandum decision denying hearing.

Jurisdiction.

The judgment of the Supreme Court of the State of California was entered on February 20, 1980. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(c).

Questions Presented.

1. Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States was violated by the decision of the San Bernardino County Department of Social Services to remove a prospective adoptive child from her prospective adoptive parents without prior notice and opportunity to be heard, in the absence of substantial evidence the child was in immediate imminent danger.

2. Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States was violated by the decision of the San Bernardino County Department of Social Services that the marital separation of petitioners *ipso facto* disqualified them from completing the adoption of this minor child.

3. Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States requires that independent counsel be present to represent the best interests of a minor child in proceedings to terminate a prospective adoption.

Constitutional Provision Involved.

The Constitutional provision involved is the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States which provides:

> ". . . . (N) nor shall any state deprive any person of life, liberty, or property, without due process of law;. . . end.

Statement of the Case and How the Federal Questions Are Presented.

Kelly Marten and Kathy Marten were initially screened, qualified, and accepted by Respondent San Bernardino County Adoption Services Agency as prospective adoptive parents in January, 1976. (CT p.974)

On January 24, 1977, the child, Sarah Kelly Marten, was born. She was relinquished for adoption oy her natural mother, her putative father, and her natural father. On May 17, 1977, the then fifteen week old child, Sarah Kelly Marten, was placed in Petitioners' home on a "quasi-adoptive" basis which was formalized as an adoptive placement on June 28, 1977, after she became legally free for adoption. (CT p.974, 975).

During the month of May, 1977, prior to the placement, Petitioners Kelly and Kathy Marten were experiencing marital problems of an unspecified nature. They did not reveal their marital problems to the agency. (CT p.974, 975) There was no evidence in the record as to the nature or seriousness of their problems.

After the placement of Sarah the husband and wife relationship temporarily improved, but it again deteriorated, and in January, 1978, they separated. Sarah remained with Kathy Marten, and Kelly Marten continued to visit her and provide his wife and child financial support. (CT p. 974, 975)

After separation, Kelly and Kathy each dated other persons, and at the time of the Grievance Review Hearing in September, 1978, Kelly, the husband, was cohabiting with another woman, with the announced intention of continuing to do so indefinitely.

In April, 1978, the agency received an anonymous telephone call stating that Kelly and Kathy were separated, and expressing concern regarding the care of Sarah by the Petitioners. (CT p. 974, 975)

At the time of the anonymous phone call, Kathy and the minor child were out of the state traveling in Texas and Nebraska. The agency had authorized her to take the minor child to Texas but she had also taken the child to Nebraska without the knowledge or consent of the agency. On June 5, 1978, following Kathy's return to California, an agency social worker contacted and interviewed Kelly and Kathy jointly. They admitted they were having marital problems, had separated in January, 1978, and had not been able to reconcile. They further admitted they had not informed the agency of their change of circumstances out of fear that the child would be removed from them. The social worker advised them that removal of the child was a possibility but indicated she would have to consult with her supervisors. (CT p. 974, 975)

Between June 5, 1978, and July 24, 1978, Sarah remained in the Marten home. No further action was taken until July 24, 1979. (CT p. 974, 975)

On July 24, 1978, an adoptions social worker interviewed Kathy with the intention of making a "psycho-social assessment" of the situation. She subsequently testified in the Grievance Review Hearing in September, 1978, that Petitioner Kathy Marten was somewhat depressed, suffered from a high leval of anxiety, had an immense over-

investment in the child as her only source of affection, and felt "abandoned" by her husband. In the opinion of this social worker, Kathy displayed a passive acceptance of her situation and a continued dependence on Kelly for financial aid. He testified that since the separation in January, she had managed on financial contributions from Kelly and small money contributions from a neighbor and from her mother. She had only managed to be employed for one week, and had no significant employment skills. (CT p. 974, 975)

This social worker rendered the opinion that Sarah had suffered developmentally since January, 1978, because of the absence of a father figure in the home, and greater difficulties would arise in the future because of this lack. He never specified how Sarah had suffered developmentally. He never indicated whether his observation was based upon an examination of the child. He never specified the basis for his projection that the child would suffer in the future. (CT p. 974, 975)

The second social worker testified that he found nothing to indicate that Sarah was physically suffering or that she was in any immediate danger. She appeared well cared for. He too advised Kathy of the possibility that Sarah would be removed from her home. Thereafter he returned to the agency and recommended Sarah's removal from the home. The agency waited one additional month before taking action. During the additional month, Sarah remained in the Marten home. (CT p. 974, 975)

The agency concluded Sarah was in "imminent danger" and recommended immediate removal without prior notification to the prospective adoptive parents or prior hearing. This recommendation was based on the social workers' assessment of the case situation. The agency concluded: (a) the placement did not meet the agency's commitment to the

natural mother to place the child in a two-parent family; (b) the placement was not in keeping with Section 30627, Subdivision (c) of Title 22 of the California Administrative Code which gives preference to two-parent families over single parent families; and (c) the placement did not have sufficient support and resources to meet Sarah's continuing physical and emotional developmental needs. No evidence was introduced at the grievance review hearing to show what Sarah's continuing physical and emotional developmental needs were and how they would not be met by the Marten placement. (CT p. 974, 975)

There is no evidence in the record that the agency conducted an investigation into whether the Martens could meet Sarah's continuing physical and emotional developmental needs even though they were separated from one another. There was no investigation into whether Petitioner Kelly Marten visited Sarah or continued to be involved with her after the separation. (CT p. 294, 295)

At the Grievance Review Hearing, Sarah was not represented by independent counsel. There was no party present representing her to conduct an investigation on her behalf to introduce evidence as to how her needs would best be met at the time of the hearing. Sarah was not represented in a hearing which had as its principal purpose a determination as to whether the only two persons she had ever known as parents would continue to be her parents. (CT p. 972, 975)

The acting chief of adoptions presented the agency's evaluation to the director of the department of social services, respondent Fred. S. Thies, and recommended that Sarah be removed forthwith without advanced notice to the parents because such notice would place Sarah in "imminent danger" because of the likelihood that Kathy would flee with Sarah. There was no evidence in the record supporting the

conclusion that Kathy would flee with Sarah if she were given prior notice. (CT p. 974, 975)

Based upon the evidence presented to him, the director found that Sarah would be placed in imminent danger if notice were given, and directed that she be removed from the Marten home without prior written notice. CT 974, 975)

Kelly and Kathy Marten requested a Grievance Review Hearing pursuant to Section 30684 of Title 22 of the California Administrative Code. After the hearing, the director approved and issued a Grievance Review Decision upholding the action of the agency, finding that the County Adoption Services and the Director of the Department of Public Social Services had sufficient and substantial cause to believe that the child Sarah Kelly Marten was a child whose health and safety were in jeopardy and that she was in imminent danger and that her jeopardy would be greatly increased if prior written notice of removal were to be given to Kelly and Kathy Marten. The Martens were permitted to visit Sarah in her foster home placement pending the outcome of litigation. (CT p. 974, 975)

Following the submission of the petition for a writ of mandate in the Superior Court, the court, exercising its independent judgment, found that "the findings of the Review Agent are supported by the summary of facts and that his recommendations are supported by his findings." The court further found that the return of the child Sarah Kelly to the Martens would "not be in the best interest in the child, and in fact would be detrimental to the child." The petition was denied and an appeal was made to the Court of Appeals.

Petitioners made the following contentions on Appeal:

1. The removal of the minor child Sarah Kelly Marten from their home without prior written notice constitutes a

denial of procedural due process of law under the Fourteenth Amendment, and

2. The marital separation of the husband and wife did not disqualify them *ipso facto* from their continuing status as prospective adoptive parents.

3. The best interests of the child required that independent counsel be appointed to represent the child in these proceedings.

The Court of Appeal affirmed the decision of the Superior Court and terminated the Marten's visitation of Sarah.

The Court of Appeal upheld the decision of the Superior Court and held that the removal of the minor child Sarah Kelly Marten from the home of Petitioners without prior written notice did not constitute a denial of procedural due process of law under the Fourteenth Amendment. Moreover the court held that the separation of Petitioners did disqualify them from continuing their status as prospective adoptive parents. Finally the court concluded that the interests of the agency and the interests of the child were identical and there was no need for independent counsel to be appointed to represent the child.

Petitioners then appealed to the Supreme Court of the State of California. The Supreme Court of the State of California denied hearing on February 20, 1980. Petitioners thereafter petitioned the Court of Appeals for the State of California for a Stay of Execution of its Order terminating visitation of the minor child, Sarah Kelly Marten. The Court of Appeals denied Petitioners' request for a Stay of Execution in a Memorandum Decision dated April 8, 1980. Thereafter, on May 8, 1980, Petitioners made application for a Stay of Execution to the Supreme Court of the United States which application is pending at this time.

Petitioners have maintained contact with their prospective adoptive daughter, Sarah Kelly Marten, at all times since she was removed from their home by means of weekly visitation permitted by the agency. (CT p. 968)

On May 9, 1979, the Court of Appeal ordered visitation to be reinstituted and visitation continued until the order of that Court terminated that visitation on November 29, 1979. (See Appendix II, Exhibit "A") Thereafter the Supreme Court of the State of California allowed visitation for the period in January 24, 1980 and February 27, 1980, pursuant to an Order which is dated January 23, 1980.

ARGUMENT.

I.

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States Was Violated by the Decision of the San Bernardino County Department of Social Services to Remove a Prospective Adoptive Child From Her Prospective Parents Without Prior Notice and Opportunity to Be Heard, in the Absence of Substantial Evidence the Child Was in Immediate Imminent Danger.

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States guarantees that each person shall be accorded a certain "process" if he is deprived of life, liberty or property. Where the power of the Government is to be used against an individual, there is a right to a fair procedure to determine the basis for, and legality of, such action.[1] In all cases where previously declared rules for adjudication of a claim exist, the State must adhere to those rules or at least not deviate from them in any manner which is unfair to the individual against whom the action is to be taken. In many cases considered by this Court, the Court has found that where there is a deprivation of life, liberty or property, it has required that the affected individual be granted a personal hearing prior to the Government's action. See *e.g.*, *Snidach v. Family Finance Corp.*, 398 U.S. 337 (1969); *Bell v. Burson*, 402 U.S. 535 (1971): *Goldberg v. Kelly*, 397 U.S. 354 (1970); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

In California, procedural Due Process of Law under the Fourteenth Amendment to the Constitution of the United

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[1]VanAlystyne *Cracks in "The New Property": Adjudicative Due Process in the Administrative state*, 62 Cornell L Rev. 445, 489 (1977)

States has been held to apply to the rights of prospective adoptive parents. (See, for example, *C.V.C. v. Superior Court* (1973) 29 Cal. App. 3d 909.) Even though California Civil Code Section 224n, which gives adoptive agencies the authority to remove children from the care and custody of prospective adoptive parents, contains no provisions for notice and a hearing as a basis for terminating the placement and removing the child prior to filing an adoption petition the Courts have imposed the standards of Due Process of Law to avoid the possibility of arbitrary agency action.

In *Smith v. Organization of Foster Families for Equality and Reform*, 413 U.S. 816, 53 L. Ed 2d 14, 97 S. Ct. 2094 (1977), The Court upheld a state procedure for removal of children from foster homes upon ten (10) days notice. In another case, *Moore v. Sims*, ____U.S. ____, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979), dissenting opinion discussed the application of the Due Process Clause in a situation where children were removed from the home by government authorities prior to notice and a hearing. That opinion observed that prior removal of children from a home, without first meeting the requirements of procedural Due Process, would be a serious violation of the Due Process Clause. In footnote 17, the dissenting opinion states:

> ". . .(I) if the District Court here is correct—and the State accepts that it is, at least in part—, that the procedures afforded by the State after its seizure of the children failed to comport with the minimum requirements of Due Process, then there is no more reason to abstain in favor of an unconstitutionally limited opportunity there than in favor of an Unconstutionally composed board (*Gibson v. Berryhill*, 411 US 554, 577; 36 L. Ed. 2nd 488, 93 S.C. 689)."

The availability of a later full hearing in a state court does not cure the problem in either case. As the Court recognized in *Gibson*, a subsequent de nuvo hearing cannot undo the inherent harm to Constitutional rights.

In California, the concepts of notice and an opportunity to be heard prior to the removal of a child from the home of its prospective adoptive family have been held to apply to the rights of prospective adoptive parents. In *C.V.C. v. Superior Court* 29 Cal. App. 3d 909 (1973), the Supreme Court of the State of California recognized that summary removal of a child from its placement with a prospective adoptive family could threaten the prospective adoptive parents with a "grievous loss". It held that the opportunity for notice and a hearing must precede, not follow, the removal of a child from the home.

However, in the present case, the Court of Appeal, in its opinion in *Marten et al. v. Thies*, 99 Cal. App. 3d 161, 160 Cal. Rptr. 57 (1979), has declined to apply the holding in *C.V.C. v. Superior Court*, supra, to the case of Petitioners. The Court of Appeal correctly characterized *C.V.C.* as holding that:

> ". . . in the absence of imminent danger to the child, the public interest in terminating placement without prior notice and hearing is outweighed by the 'grievous loss' threatening the prospective parents."

It has been suggested by the Court of Appeal that this statement in *C.V.C.* is overly "broad" and cannot be fully justified in view of the state's paramount interests in promoting the child's welfare and the belief that any delay in finding a proper permanent placement may be detrimental to the child.

In the Grievance Review Hearing, the only justification given by the adoption agency for removing Sarah from the

Marten home without advance notice to her parents was the fear that notice would place Sarah in "imminent danger" because Kathy would flee with Sarah. There was no evidence in the record supporting the conclusion that Kathy would flee with Sarah if she were given prior notice of the hearing before the child were removed from her home. It has been conceded by all parties that Sarah was not in actual "imminent danger" at the time of her removal.

The Court of Appeal had upheld the Superior Court and the Grievance Review Agent's determination that Sarah was in prospective "imminent danger" because of the uncertainties cast upon her life by the separation of her prospective adoptive parents.

It is significant to note that the agency first learned of the Martens separation in April, 1978. The agency first discussed the separation with the Martens on June 5, 1978, and made a second investigation on July 24, 1978. Sarah was not removed from the home until August 24, 1978, and the hearing was not held until September, 1978. This delay in removing Sarah from the home after learning of the Martens' separation discredits the agency's stated belief that Sarah was in "imminent danger".

In the absence of substantial evidence of actual "imminent damger", there has been no justification in the record for removing Sarah from the Martens' home prior to the hearing.

It is respectfully submitted that the grievance review procedure employed in this case violated Petitioners right to Due Process of law. For this reason, the decision of the Court of Appeal for the State of California, Fourth Appellate District, Second Division, should be reversed and the child, Sarah, should be returned to the Marten home pending a factual hearing into the questions raised by her threatened

removal. The procedural due process requirements of prior notice and an opportunity to be heard, as embodied in the Fourteenth Amendment to the Constitution of the United States, should be applied by this Court to the rights of prospective adoptive parents as was done in another California case, *C.V.C. v. Superior Court*, 29 Cal. App. 3d 909 (1973).

II.

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States Was Violated by the Decision of the San Bernardino County Department of Social Services, That the Marital Separation of Petitioners Ipso Facto Disqualified Them From Completing the Adoption of This Minor Child.

When Sarah was placed with the Marten family, the Martens were united. Any marital difficulties they may have been experiencing were not specified in the grievance review hearing and have never been made a part of this record. The Martens remained united for many months after the placement of Sarah in their home. After they separated, Sarah remained with Kathy Marten and Kelly Marten continued support and visitation. At the time of her removal, Sarah Kelly Marten was 18 months old. Kathy and Kelly Marten were the only persons she had ever known as parents.

In adoption proceedings, the child's best interests are the primary concern.

San Diego County Department of Public Welfare v. the Superior Court (1972) 7 Cal. 3d 1, 7, 101 Cal. Rptr. 541.

Title 22, Section 30627 (c) and (d), requires that the agency consider the *particular needs* of the *particular child* as determinitive of that child's best interests. The California Administrative Code requires that the Grievance Review

Agent and the Superior Court consider the particular circumstances of this particular family in terms of the amount of time the child has spent with Petitioners the quality and level of care given to the child, and the extent to which Petitioners have met Sarah's particular needs.

Section 30627 (c) provides:

> "Application from single persons, whether unmarried, widowed, or divorced, may be accepted when two-parent families cannot be found to meet the needs of *particular* children" (Emphasis added).

There was no substantial evidence in the record that the needs of this particular child, Sarah Kelly Marten, were not being met by a continued placement in the Marten home.

In C.V.C. v. Superior Court, supra, 29 Cal. App. 3d 909, at 916, the Court of Appeal noted that the placement of a prospective adoptive child with its prospective parents "initiates 'closest conceivable counterpart of the relationship between parent and child'."

Specialists in the field of child development substantially agree that a warm, continuous relationship between parent and child is necessary for the child's successful character development.[2] It is respectfully submitted that the opinion of the Court of Appeal in *C.V.C. v. Superior Court, supra*, reflects a policy judgment to the effect that a sudden, traumatic separation between "parent" and child, particularly between "mother" and child, should be subject to the strongest due process scrunity.

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[2]See J. Bowlby, Maternal Care and Mental Health 11 (1952); S. Chess, An Introduction to Child Psychiatry 84 (1959); A. Freud *Normality and Pathology in Childhood* 66-67, 86-87 (1965); A Gesell & F. Ilg, *The Child from Five to Ten* 32 (1946).

The importance of a strong and continuous parental relationship to a child's physical, mental and emotional development is well established. Infants derive from their parents the sense of trust that forms the basis for character and identity development. Continuous care for the child's needs for sustenance, affection and stimulation is critical. As the child learns to cope with physical and emotional changes, as well as the demands of the outside world, a stable home environment is essential to overcome the feelings of inadequacy and insecurity which inevitably arise. Continuity of parental affection and care provides the cornerstone for the child's sense of self worth and security; parental discipline and example develop the wellsprings of values and ideals.[3]

The effect on children of traumatic separation from their parents, particularly their mothers, has been well documented. Clinical research, for example, established that early "maternal deprivation" can lead to neurosis and instability of character in adulthood. Other child development specialists have recognized that the potential effects of separating parent from child, though varying with age, can be traumatic even for very young infants. For infants up to 18 months old, disruption in continuity of care may create physical discomfort, crying, digestive upsets, sleeping problems and delays in the infant's orientation and adaption to surroundings. For toddlers and young children, separation may not only lead to distress and anxiety but also can set back the growth and quality of interpersonal attachments. By eroding the security needed to form trusting relationships, multiple placements of a young child may also result in shallow, indiscriminate emotional relationships in later years. For school-age children, separation may impair the

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[3] *In the Child's Best Interests: Right of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U.L. Rev. 446, 450 (1976).

development of goal orientation and values that stems from identification with parental ideals. Multiple placements may become the source of antisocial, delinquent or criminal behavior.[4]

When a tiny infant is first placed for adoption by an adoption agency, the prospective parents devote time to raising their new family member and soon develops a bond with its parents. Thus the placement of a child with prospective adoptive parents marks the beginning of a close parent-child relationship. California courts have recognized that the prospective parents' interest in continuing the relationship is entitled to due process protection.[5]

There has been no evidence that such a bond has not been formed between the minor child, Sarah Kelly Marten, and Kelly and Kathy Marten. Moreover, no evidence was introduced at the grievance review hearing to show how the absence of a father figure in the home had adversely affected Sarah. No evidence was introduced to identify Sarah's continuing phsical and emotional developmental needs and show how these needs were not being met by the Marten placement. There is no evidence the agency conducted an investigation into whether the Martens met Sarah's continuing physical and emotional developmental needs even though they were separated from one another. The Court of Appeal has stated that the perceived commitment of the agency to the natural mother and the sociological preference for the two-parent family is merely:

> "Evidence of . . . the common intelligence regarding the desirability of such a family unit, and that there

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[4]51 N.Y.U.L. Rev. *supra* at p. 450.

[5]Comment, *Due Process and the Adoptive Parent*, 15 Santa Clara Lawyer 161 (1975).

were no apparent factors negating its desirability in this case."

The opinion reaffirms the general sociological preference given two parent families as adoptive placements and states the Marten home was deficient because there was a lack of emotional stability of the parents, a lack of parental sensitivity to the child's developmental needs, a lack of trustworthiness of the parents and their ability to abide by the rules, a lack of maturity of the parents, a lack of motivation to correct deficiencies, and a lack of economic security. Patently there is no evidence in the record to support these conclusions by the Court of Appeal. These conclusions were even beyond the findings of the Agent. The Court of Appeal states:

> "It appears from an examination of the record that these prospective adoptive parents were selfishly motivated in adopting the child to satisfy their own emotional needs, and were not sufficiently concerned with the welfare of the child. The concealment of the marital difficulties and failure to report their separation suggests that the initial placement may have been sought in a effort to salvage a failing marriage."

There is no evidence in the record that the parents were selfishly motivated in adopting Sarah. Moreover there is no substantial evidence that the placement of Sarah resulted from a desire on the part of the Martens to save a failing marriage. To the contrary, the Martens were screened and qualified as prospective adoptive placement in 1976, before evidence of marital difficulties had surfaced.

Not only is there no substantial evidence to support the trial court's determination that the agency findings were supported by the weight of the evidence, there is clearly no evidence to support the opinion of the Court of Appeal that

ıe Martens were "selfishly motivated" in adopting Sarah nd were not sufficiently concerned with her welfare.

The opinion of the Court of Appeal has directly avoided ıe question of whether the separation of the Martens should r should not disqualify them from continuing to be parents f Sarah.

The decisions of the county adoption agency, the Superior ;ourt and the Court of Appeal, all reflect a traditional anal- sis and an exaltation of form over substance. The law of ıe State of California does not now and has not ever re- uired that, mid-course in the adoption procedure, a child ıust be summarily removed from the home of the pro- pective adoptive parents merely because the parents, who vere united at the time of the original placement, have eparated.

There has been a failure of substantial evidence to show hat Sarah Kelly Marten was in any way endangered by the eparation of her parents.

The investigation of the Martens by the agency was trig- ;ered by an anonymous telephone call five months prior to he removal of Sarah from the Marten home. At the time ;arah was removed she had known petitioner, Kathy Mar- en, as her mother for 14 critical months. Since the time he has been removed, petitioners Kathy and Kelly Marten ıad continued to exercise weekly visitation of Sarah, and ;arah still knows them as her only parents. There was no :vidence in the record that the Martens were not performing he functions of parents. The social worker testified Sarah ıppeared to be well cared for. And there was no evidence o support his conclusion that she was suffering develop- nentally from the lack of a father figure in the home.

It is respectfully submitted that the agency's decision to 'emove Sarah from the Marten's home was not supported

by substantial evidence and the decision of the Court of Appeal affirming that determination should be reversed. The failure of petitioners to report their separation to the agency only reaffirms their love and care for the child Sarah and their desire to maintain their relationship with her notwithstanding their failure to resolve marital problems. It should not have been construed as evidence of untrustworthiness as indicated by the Court of Appeal.

III.

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States Requires That Independent Counsel Be Present to Represent the Best Interests of the Minor Child in Proceedings to Terminate a Prospective Adoption.

Before the decisions of this Court in *Kent v. United States*, 383 U.S. 541 (1966) and *In re Gault*, 387 U.S. 1 (1967), the concept of mandatory legal representation for children in judicial proceedings was virtually unknown.[6]

In child custody disputes, for example, courts have been deciding issues regarding the custody of children for a long time and, for many years, the rights accorded to the children involved in these proceedings were non-existent. The changing focus of our judicial system has resulted in an expansion of children's rights and a more frequent use of experts including social workers, mental health professionals and others to assist the judge in making decisions regarding custody. In cases involving the termination of the right of prospective adoptive parents and their prospective children, the interests of justice would be served by the presence of independent counsel to represent the child.

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[6]Moyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. of Fam. Law 1, 3 (1977-78)

At the Grievance Review Hearing in September, 1978, Sarah was not represented by independent counsel. There was no party present representing her to conduct an investigation on her behalf to introduce evidence as to how her needs would best be met at the time of the hearing. Sarah was not represented at the hearing which had as its principal purpose a determination as to whether the only two persons she had ever known as parents would continue to be parents.

There is no deprivation more severe to a small child than the loss of those persons whom the child knows to be its parents. Sarah is now a three and a half year old child who knows Kelly and Kathy Marten to be her parents.

The interests and rights of children are frequently jeopardized in court proceedings because the "best interests of the child" are determined without resort to an independent advocate for the child. While parents or public or quasi-public agencies claim to speak for the child, each of these parties may have its own particular concerns which color its presentation of the child's interest.[7]

In a present case it would have been of utmost interest to all parties in question to have independent counsel appointed to represent little Sarah, a person who has the most at stake in this proceeding and has had the least to say about the outcome.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Concept of Due Process of Law as Embodied in the Fourteenth Amendment of the Constitution of the United States.

Critical to the present case is the distinction between immediate "imminent danger" and prospective "imminent danger". The relationship of parent and child embodies the most fundamental interest in society because the family forms the basis for all societal organization. The relationship a small child has with those persons whom he or she knows to be parents forms the basis for all trust, understanding, obedience to law, and desire to thrive and grow as a human being. This case thus far involves the most fundamental of human values. The decision by the County of San Bernardino to sever the ties between Sarah Kelly Marten and her prospective adoptive parents, if left unchallenged, would permit a governmental agency to forever separate this tiny girl from those first important figures in her life. Moreover, the decision of the Agency conflicts with the concept that Due Process of Law previously applicable in the State of California as reflected in the case of *C.V.C. v. Superior Court, supra*. The *C.V.C.* case required notice prior to removal except where "immediate imminent danger" was threatened, and in the present case, it is conceded by all parties that there was no "immediate imminent danger" to Sarah.

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[7]*Separate Legal Representation for Children; Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 Harv. Civil Rts.—Civil Liberties L.Rev. 565 (1976)

2. The Decision Below Raises Significant and Recurring Problems in the Administration of Government Adoptive Social Services.

In the last decade, the number of babies available for adoption has diminished and the demand for adoption infants has increased. The consequences of decisions by public adoption agencies are becoming matters of greater importance as the supply of these precious infants declines. The manner in which public adoption agencies deal with prospective adoptive parents has significance for beyond this particular case.

The decision to remove Sarah from the home of the Martens is part of an on-going policy of the County of San Bernardino Department of Adoptions. This policy potentially poses a threat of harm to all young individuals similarly situated. In our society, divorce is a common phenomenon. There are no guarantees thay anyone's marriage will remain intact. With the advent of no-fault divorce in California, a marital agreement can now be broken at will by either of the two parties with no provocation at all. It is respectfully submitted that severance of a marital relationship should not also bring with it severance of a relationship of parent and child which was established during the existence of the marriage. Marriages may be severable at will, but parents are forever.

Finally, the correctness of the decision below, even assuming the propriety of the Court's refusal to apply *C.V.C. v. Superior Court* to the present case, is open to serious question. The record shows quite plainly, that there is no substantial evidence in the record to support the claim that Sarah was in "immediate imminent danger".

Conclusion.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California denying the hearing in this case.

May 16, 1980.

Respectfully submitted,

BEVERLY WILSON QUINN,
600 No. Mountain Ave., Suite E,
Upland, Calif. 91786,
Counsel for Petitioners,

APPENDIX I.

Statutes.

California Administrative Code, Title 22, Section 30627 (c).

California Administrative Code, Title 22, Section 30627 (d).

California Administrative Code, Title 22, Section 30627 (d).

West's Annotated California Civil Code, Section 224 (n).

CALIFORNIA ADMINISTRATIVE CODE, TITLE 22, ARTICLE 9.

Article 9. Grievance Procedures—Relinquishment Adoption Program.

30684. Grievance Procedures. (a) Each public and private licensed adoption agency shall make provisions for the review of complaints by adoptive parent)s) as related to the placement, care, or removal of children from an adoptive home. All issues shall be considered in the best interest of the child.

(b) Definitions.

(1) Grievance—A Grievance is a complaint or expression of dissatisfaction about procedures or actions taken by an adoption agency relating to an adoptive home placement.

(2) Child in Imminent Danger—A child whose health and safety are in jeopardy.

(3) Grievance Review Agent—A person or panel designated by the director of the local agency to conduct the grievance review and render a recommended decision to the director of the agency. The agent need not be employed by the agency but shall be: (A) Person(s) not involved in the action complained of, (B) Person(s) not directly in the chain

of supervision of any of the persons involved in the action complained of, with the exception of the director or his chief deputy, and (C) Person(s) knowledgeable of the field and capable of objectively reviewing the agency complained of.

(4) Parties to Grievance Review—The adoptive parent)s) requesting the review and the agency responsible for the action complained of.

(5) Adoptive Parent(s)—Person(s) with whom a licensed adoption agency in California has placed a child for a adoption and for whom an adoption petition has not been filed.

(6) The Representative—An individual, including an attorney at law, relative, friend, or other person authorized in writiing by the complainants or by the agency to act for and represent a party to the review in any and all aspects of the hearing.

(c) Notification of Grievance Review Procedures.

(1) Adoptive applicants shall be informed during the home study that in the event there is dissatisfaction with an administrative action taken by the agency after the placement of a child in the home they have a right to a grievance review.

(2) Adoptive applicants shall be given a copy of the agency procedures during the home study.

(3) The Adoptive placement agreement shall include a statement referring to the rights to a grievance review.

(d) Notification of Intent to Move Child.

(1) Advance Notice Requirements. The adoptive parent(s) shall have not less than seven calendar days written notice of the agency's intention to remove a child placed in the home. The exceptions are written:

(A) The agency director has reasonable cause to believe the child is in imminent danger, the child may be removed without prior notice but within seven days written notice shall confirm reasons for removal, or

(B) The agency and adoptive parent(s) by mutual agreement approve removal of the child.

(2) The notice shall contain the date of the intended removal, the reasons for the removal, and the right to a hearing prior to removal as provided in Section "F" of these regulations.

(e) Persons Entitled to Grievance Review.

(1) Any adoptive parent(s) dissatisfied with any agency action relating to a child placed in his home for adoption and for whom an adoption petition has not been filed may request a review of the agency decision.

(2) Exceptions. No grievance review under this procedure shall be granted on the following cases:

(A) The removal of a child resulting from a court order.

(B) A complaint involving only a question regarding the validity of a law or departmental regulation.

(c) Any issue for which a fair hearing is available pursuant to Welfare and Institutions Code Sections 10950 through 10965.

Section 30627 (c). Applications from single persons, whether unmarried, widowed, or divorced, may be accepted when two-parent families cannot be found to meet the needs of particular children.

Section 30627 (d). Applications to adopt a specific child may be accepted only when necessary to meet the needs of the child.

Section 224n. [Duties and rights of adoption agency: Placement for temporary care or for adoption: Petition for

adoption: Removal of child from prospective adoptive parents: Refusal of agency to consent to adoption].

The agency to which a child has been relinquished for adoption shall be responsible for the care of the child, and shall be entitled to the exclusive custody and control of the child at all times until a petition for adoption has been granted. Any placement for temporary care, or for adoption made by the agency, may be terminated at the discretion of the agency at any time prior to the granting of a petition for adoption. In the event of termination of any placement for temporary care or for adoption, the child shall be returned promptly to the physical custody of the agency.

No petition may be filed to adopt a child relinquished to a licensed adoption agency or a child declared free from the custody and control of either or both of his parents and referred to a licensed adoption agency for adoptive placement, except by the prospective adoptive parents with whom the child has been placed for adoption by the adoption agency. After the petition for adoption has been filed, the agency may remove the child from the prospective adoptive parents only with the approval of the court, upon motion by the agency after notice to the prospective adoptive parents, supported by an affidavit or affidavits stating the grounds on which removal is sought. If an agency refuses to consent to the adoption of a child by the person or persons with whom the agency placed the child for adoption, the superior court may nevertheless decree the adoption if it finds that the refusal to consent is not in the best interest of the child.

APPENDIX II.

Exhibits A.

Exhibit "A". Opinion of the Court of Appeal for the State of California Fourth Appellate District, Second Division, dated November 29, 1979.

Court of Appeal, Fourth District, Second Division, State of California, Kelly Marten, et al., Plaintiff and Appellants, v. Fred F. Thies, as Director of the County Department of Public Social Services, etc., et al., Defendants and Respondents. 4 Civil 21214 (Super.Ct.No. 188262).

Filed: Nov. 29, 1979. APPEAL from the Superior Court of San Bernardino County. Don A. Turner, Judge. Affirmed.

Steven P. Beltran for Plaintiff and Appellant Kelly Marten.

Beverly Wilson Quinn for Plaintiff and Appellant Kathy Marten.

Alan K. Marks, County Counsel, and Richard W. Strong, Deputy County Counsel, for Defendants and Respondents.

The defendant placement agency terminated the status of plaintiffs, husband and wife, as prospective adoptive parents when the agency removed the minor child, Sarah Kelly, from their home. Husband and wife appeal from the denial of their petition for writ of mandate, seeking an order reinstating them as prospective adoptive parents and returning the minor child to the home.

Following the removal of the child from their home, husband and wife sought and obtained a grievance review hearing pursuant to California Administrative Code, title 22, section 30684.

The statement of facts as found by the administrative hearing officer was submitted to the trial court by stipulation

and no additional evidence was presented.[1] The facts pertinent to this appeal may be briefly stated.

The husband and wife, Kelly Marten and Kathy Marten, were initially screened, qualified, and accepted by respondent San Bernardino County Adoption Services (Agency) as prospective adoptive parents in January of 1976.

On May 17, 1977, a then 15-week-old minor child, Sarah Kelly, was placed in husband and wife's home on a "quasi-adoptive" basis, which was formalized as an adoptive placement on June 28, 1977, after the child became legally free for adoption. Husband and wife were experiencing "marital problems" of an unspecified nature during the month of May 1977 prior to the placement. This fact was not revealed to the Agency.

Although the husband and wife's relationship temporarily improved, it again deteriorated, and in January of 1978, they separated. Contrary to their agreement with the Agency, they did not inform the Agency of this change in their circumstances, and they did not seek any professional help for their marital problems.

Following their separation, the husband and the wife each dated other persons, and at the time of the grievance review hearing, the husband was cohabiting with another woman, with the announced intention of continuing to do so indefinitely. The husband did continue to provide some financial support to the wife.

In April of 1978, the Agency received an anonymous phone call stating that the husband and the wife were sep-

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[1]The petition for writ of mandate was submitted with the stipulation that the court could read and consider the report of the grievance review agent and that no transcript of the testimony taken would be submitted. Under these circumstances this court must accept as true the facts set forth in the statement of facts submitted to the trial court.

arated, and expressing concern regarding the care of the child by the husband and wife. At that time the wife and the minor child were out of the state. The Agency had authorized the wife to take the minor child to Texas. Instead, she had taken the child to Nebraska without the knowledge or consent of the Agency.

On June 5, 1978, following the wife's return to California, an Agency social worker interviewed the husband and wife jointly. The husband and wife admitted to the social worker at this time that they were having marital problems, had had marital problems at the time the child was placed with them, that they had separated in January 1978, and had no plans to seek marital counseling or to reconcile. They further admitted that they had not informed the Agency of their changed circumstances out of fear that the child would be removed from them.

The social worker advised the husband and wife that she would consult with her supervisors, but that removal of the child was a possiblity. On July 5, 1978, in a separate interview between the social worker and the husband, the husband stated that if the child were to be removed from the family home there would be no possibility of a reconsiliation with his wife.

In order to obtain a secon opinion, an adoptions social worker was assigned to make a psycho-social assessment of the situation. He interviewed the wife on July 24, 1978, and reported the following impressions. The wife was somewhat depressed, suffered from a high level of anxiety, had an immense over-investment in the child as her only source of affection, and felt "abandoned" by the husband. She displayed a passive acceptance of her situation and a continued dependence on the husband for financial aid. Her reality situation was continuing to deteriorate. Since the

separation she had managed on financial contributions from the husband and small money contibutions from a neighbor and money and food from her mother. She had only managed to be employed for one week, and had no significant work history or job skills.

The second social worker was of the opinion that the child had suffered developmentally since January 1978, because of the absence of a father figure in the home, and that greater difficulties would arise in the future because of this lack. He found nothing to indicate that the child was physically suffering or that she was in any immediate danger; she appeared well cared for. He too advised the wife of the possibility that the child would be removed from her home. Thereafter, he did recommend the child's removal from the home.

Based upon the social workers' assessment of this case situation, the Agency concluded that: (a) the placement did not meet the Agency's commitment to the natural mother to place the child in a two parent family; (b) the placement was not in keeping with section 30627, subdivision (c) of title 22 of the California Administrative Code which gives preference to two parent families over single parent families; (c) the placement did not have sufficient supports and resources to meet the child's continuing physical and emotional developmental needs.

The acting chief of adoptions presented the Agency's evaluation to the Director of the Department of Public Social Services, respondent Fred F. Thies, and recommended that the child be removed forthwith. The acting chief further recommended that no advance notice of the removal should be given to the husband and wife because the Agency believed that such notice would place the child in imminent danger because of the likelihood that the wife would flee with the minor child.

Based upon the evidence presented to him, the director found that the child would be placed in imminent danger if notice were given, and directed that the child be removed from the home without prior written notice.

The husband and wife requested a grievance review hearing pursuant to section 30684 of title 22 of the California Administrative Code. Thereafter, pursuant to the findings and recommendations of the grievance review agent, the director approved and issued a grievance review decision upholding the actions of the Agency, finding that the county adoption services and the director of the Department of Public Social Services had sufficient and substantial cause to believe that the child Sarah Kelly Marten was a child whose health and safety were in jeopardy, and that she was in imminent danger and that the jeopardy would be greatly increased if prior written notice of removal were to be given to the husband and wife.

Following the submission of the petition for writ of mandate in the superior court, that court, exercising its independent judgment found that "the findings of the Review Agent are supported by his summary of facts and that his recommendations are supported by his findings." The court further found that the return of the child, Sarah Kelly, to the husband and wife "would not be in the best interest of the child, and in fact would be detrimental to the child." The petition was denied. This appeal followed.

Husband and wife appear to make the following contentions on appeal

1. The removal of the minor child Sarah Kelly from their home without prior written notice constituted a denial of procedural due process of law under the Fourteenth Amendment, and

2. The separation of the husband and the wife does not

disqualify them for the continuing status of prospective adoptive parents.

In her reply brief, the wife makes the additional contention that,

3. The best interests of the child require that independent counsel be appointed to represent the child in these proceedings.

I.

Due Process.

Subject to constitutional limitations, the controlling authority for the termination of adoptive placement is Civil Code section 224n which provides in pertinent part as follows:

"The agency to which a child has been relinquished for adoption shall be responsible for the care of the child, and shall be entitled to the exclusive custody and control of the child at all times until a petition for adoption has been granted. Any placement for temporary care, or for adoption made by the agency, may be terminated at the discretion of the agency at any time prior to the granting of a petition for adoption. In the event of termination of any placement for temporary care or for adoption, the child shall be returned promptly to the physical custody of the agency."

The statute makes no provision for notice and hearing as a basis for terminating adoptive placement and removal of the child prior to the filing of an adoption petition. Nor does the statute provide for judicial review of such agency action.[2] To guard against the possibility of arbitrary agency action, the appellate court in *Rodriguez v. Superior Court*

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[2]The statute does provide for notice and hearing prior to removal after the adoption petition is filed. The second paragraph of Civil Code Section 224n provides as follows:

(1971) 18 Cal.App.3d 510, held that the administrative action of an agency in a pre-adoption placememt should be subject to judicial review. The *Rodriguez* court declared: "The manifest importance of an adoption to the welfare of a child, as well as the importance to the prospective parents and to the state, impel us to conclude that the administrative action of the agency in a pre-adoption placement should be subject to judicial review. Although no provision for such review is found in section 224n and relevant sections of the Civil Code, we hold that an order by an adoption agency to terminate an adoptive parent-child placement status is a reviewable administrative order within the ambit of sections 1084 and 1085 of the Code of Civil Procedure." (*Id.*, at p. 513.)

In *C.V.C. v. Superior Court* (1973) 29 Cal. App. 3d 909, the court expanded the right to judicial review which had been extended to adoptive parents in *Rodriguez*. The court in *C.V.C.* discovered that the Fourteenth Amendment's guarantee of due process requires that prospective adoptive parents be given notice and an opportunity to be heard before the termination of status and removal of the child from the pre-adoptive placement except in extraordinary circumstances.

"No petition may be filed to adopt a child relinquished to a licensed adoption agency or a child declared free from the custody and control of either or both of his parents and referred to a licensed adoption agency for adoptive placement, except by the prospective adoptive parents with whom the child has been placed for adoption by the adoption agency. After the petition for adoption has been filed, the agency may remove the child from the prospective adoptive parents only with the approval of the court, upon motion by the agency after notice to the prospective adoptive parents, supported by an affidavit or affidavits stating the grounds on which removal is sought. If an agency refuses to consent to the adoption of a child by the person or persons with whom the agency placed the child for adoption, the superior court may nevertheless decree the adoption if it finds that the refusal to consent is not in the best interest of the child."

In elaborating its review concept the court stated, "Entitlement to procedural protections depends upon the extent to which 'grievous loss' is threatened; it requires the court to weigh the individual's interest in avoiding the loss against the governmental interest in summary adjudication. The opportunity for hearing must precede, not follow, the deprivation, except for extraordinary occasions where some valid governmental interest justifies summary deprivation." (*C.V.C. v. Superior Court, supra*, 29 Cal. App. 3d 909, 915, fns. omitted.)

The *C.V.C.* court recognized that the governmental interest in pre-adoption placement is weighty. "The statutory system for relinquishment to the agency, for agency placement and agency approval, bespeaks a state policy to promote the child's welfare in derogatiion of all other values. Civil Code section 224n . . . distinctly expresses the state's ongoing interest in terminating an agency placement whenever the child's welfare is endangered. It expresses a legislative design to give the prospective parents only provisional and tentative status until they file an adoption petition. Until then, the licensed adoption agency is entitled to custody and control 'at all times'; the placement may be terminated 'at any time' at the agency's discretion; upon termination the child is to be returned 'promptly' to the physical custody of the agency. These firm legislative expressions were designed to elevate the placement agency's discernment of danger above the interests of the prospective parents." (*C.V.C. v. Superior Court, supra*, 29 Cal. App. 3d 909, 916.)

Nevertheless, the court found that, in the absence of imminent danger to the child, the public interest in terminating placement without prior notice and hearing is outweighed by the "grievous loss" threatening the prospective parents. The court noted that the second paragraph of Civil Code

section 224n provides for notice and hearing if the agency wishes to remove the child after an adoption petition has been filed, and found that the "constitutional entitlement of the prospective parents is no less preceding the petition's filing." (*C.V.C. v. Superior Court, supra*, 29 Cal. App. 3d 909, 917, fn. omitted.)

Whether or not this broad statement can be fully justified in view of the state's paramount interest in promoting the child's welfare (any delay in finding a proper permanent placement may be detrimental to the child), the California Administrative Code, title 22, section 30684, now incorporates the requirements unfolded in *C.V.C.*

The section provides in pertinent part as follows:

"30684. Grievance Procedures. (a) Each . . . licensed adoption agency shall make provision for the review of complaints by adoptive parent(s) as related to the placement, care, or removal of children from an adoptive home. All issues shall be considered in the best interests of the child.

"(b) Definitions

" . . .

"(2) Child in Imminent Danger—A child whose health and safety are in jeopardy.

"

"(5) Adoptive Parent(s)—Person(s) with whom a licensed adoption agency in California has placed a child for adoption and for whom an adoption petition has not been filed.

" . . .

"(d) Notification of Intent to Move Child.

"(1) Advance Notice Requirements. The adoptive parent(s) shall have not less than seven calendar days' written notice of the agency's intention to remove a child placed in the home. The exceptions are when:

"(A) The agency director has reasonable cause to believe the child is in imminent danger, the child may be removed without prior notice but within seven days written notice shall confirm reasons for removal. . . ."

It is clear that the Agency followed the removal procedure authorized in the case of a child who is in "imminent danger." Husband and wife do not quarrel with the principle that their right to procedural due process is to be balanced against the state's interest in terminating adoption agency placements without prior notice and hearing whenever the child's welfare is endangered. However, husband and wife contend that here the child's danger was not imminent but merely "potential" or "ultimate," and therefore the public interest could well afford the time and effort consumed by according them a pre-removal hearing.

Because of the fundamental interest involved, the court correctly applied the independent judgment test in weighing the evidence. (*C.V.C. v. Superior Court, supra*, 29 Cal. App. 3d 909, 919.) The court found that the findings of the review agent are supported by the weight of the evidence in the whole record, that the review agent's recommendations are supported by the findings and that the return of the child to the husband and wife would be detrimental to the child.

The issue presented by the contention that the husband and wife were deprived of due process is whether there is substantial evidence to support the trial court's determination that the finding, that the Agency director had reasonable cause to believe the child was in "imminent danger," is supported by the weight of the evidence. We have concluded that there is.

Husband and wife would have us define "imminent danger" as "immediate physical danger." The term may not

be so narrowly defined. The Administrative Code, title 22, section 30684, subdivision (b)(2) defines the words "Child in Imminent Danger" as "A child whose health and safety are in jeopardy." It seems clear that by so defining the term it was intended to include the "risk" of injury or "projected" danger as well as present or existing danger.

This is particularly so in view of the overriding statutory purpose of promoting the child's welfare. Where the agency reasonably believes that the child's health and safety would be endangered by prior notification of the agency's intent to remove the child, the agency is under a duty to withhold notification by reason of the overriding principle that it must act in the best interests of the child.

In this case the acting chief of adoptions presented the Agency's evaluation to Director Thies, and recommended that the child be removed forthwith, and that no pre-removal notice be given the husband and wife because to do so, in the Agency's judgment, would place the child in imminent danger because the wife was likely to flee with the minor child.

The evidence supporting the reasonableness of this belief consisted of: (1) the husband and wife's concealment of their marital differences in order to obtain the adoptive placement; (2) their failure to report their separation as required by their agreement with the Agency; (3) the wife's previous conduct in taking the child to an unauthorized destination out of the state; (4) the wife's emotional instability and over-dependence on the child for her emotional needs; (5) insensitivity of both husband and wife to the child's emotional and developmental needs; and (6) the fact that the fear of losing the child had been the stated reason for their untruthfulness and subterfuge. In view of this history, the director's belief that the wife might flee with the child was clearly reasonable.

Moreover, there was evidence that the child had already suffered "developmentally" because of the changed circumstances in the home. Such emotional endangerment is within the definition of "imminent danger." We conclude that the evidence amply supports the trial court's finding.

II.

Disqualification.

Husband and wife next argue that the fact of their marital separation does not "a fortiori" disqualify them as prospective adoptive parents. Be that as it may be, that is not the issue presented on the record before this court. The issue we must resolve is whether the trial court properly found that the weight of the evidence supports the finding that "to return the child, Sarah Kelly, to the petitioners would not be in the best interest of the child, and in fact would be detrimental to the child."

It is immaterial whether under other circumstances marital separation would or would not adversely affect an adoptive placement. The question is whether continued placement in the Marten home is in the best interests of this child.

California Administrative Code, title 22, section 30627, gives expression to the common experience that two parent families generally best meet the needs of young children. That section clearly prefers such two parent homes, and only authorizes the acceptance of applications from single persons when two parent families cannot be found to meet the needs of particular children. In the instant case there is the added factor that the relinquishment was specifically obtained with the tacit understanding that efforts would be made to place the child in such a family unit. This tacit agreement with the natural mother does not, as the husband and wife suggest, indicate any conflict of interest between

the Agency and the child. Evidence of this understanding merely serves to underscore the common intelligence regarding the desirability of such a family unit, and that there were no apparent factors negating its desirability in this case.

In addition to the general sociological preference given two parent families as adoptive placements, the husband and wife's home was clearly deficient in other important respects, to wit, emotional stability of the parents, parental sensitivity to the child's developmental needs, trustworthiness of the parents and their willingness to abide by the rules, maturity of the parents, motivation to correct deficiencies, and economic security. It appears from an examination of the record that these prospective adoptive parents were selfishly motivated in adopting the child to satisfy their own emotional needs, and were not sufficiently concerned with the welfare of the child. The concealment of their marital difficulties and failure to report their separation suggests that the initial placement may have been sought in an effort to salvage a failing marriage. It is unfortunate when natural parents resort to such practices; to permit adoption to be used for such purpose would be a serious breach of duty on the part of the Agency.

There is clearly substantial evidence to support the trial court's determination that the Agency findings were supported by the weight of the evidence, and that the findings supported the decision to remove the child and terminate the placement.

III.

Independent Counsel.

Finally, for the first time, in her reply brief, the wife argues that the best interest of the child requires that independent counsel be appointed to represent the child Sarah

Kelly in these proceedings, and requests that this case be remanded to the superior court for appointment of counsel, and presumably, to hold a new hearing.

The wife fails to state in what respect an attorney is better qualified to communicate with, and represent the interests of an infant regarding her adoptive placement than the agency established for that purpose, and designated for that purpose by the Legislature.

The only suggestion is that "While parents or public or [quasi]-public agencies claim to speak for the child, each of these parties may have its own particular concern[s] [which] color its presentation of the child's interest." This is undoubtedly true. However, there is absolutely nothing in the record in this case to suggest that respondents in this case had any concern other than the welfare of the child.

The sole suggestion appearing even in the wife's argument is that the "tacit" understanding with the natural parents that the child would be placed in a two parent home somehow created a conflict of interest. This is presumably on the theory that the commitment to the mother dilutes the responsibility to the child. If that is so, then the Administrative Code itself creates the conflict by preferring two parent homes. We reject this thesis. Absent a showing of unavailability of a two parent home that will meet the child's needs, we accept the administrative finding that the needs of this child can best be met by placement in a two parent home.

Absent a showing of an actual conflict between the interests of the agency and the child, we decline to further encumber the pre-petition placement procedure, and thus prolong the delay in permanent placement to the child's detriment, by requiring that separate counsel be appointed for the child.

Because of the husband's and the wife's concealment of their true marital circumstances, they have already delayed the child's placement in a proper adoptive home by several months, to the child's detriment. Further legal maneuvers to perpetuate a relationship initiated by their own wrongful act should not be tolerated.

The judgment is affirmed.

The stay of the decision of Fred F. Thies, Director of San Bernardino County Department of Public Social Services, in this proceeding heretofore granted by this court on May 9, 1979, is hereby vacated.

CERTIFIED FOR PUBLICATION.

/s/ MORRIS
J.

We concur:

/s/ KAUFMAN
Acting P.J.

/s/ MC DANIEL
J.

Supreme Court, U. S.
FILED
AUG 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1850

KELLY MARTEN and KATHY MARTEN,
Petitioners,

vs.

FRED F. THIES, Director of the San Bernardino Department of Public Social Services,
Respondents.

Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California

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I.

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1850

KELLY MARTEN and KATHY MARTEN,

Petitioners,

vs.

FRED F. THIESS, Director of the San Bernardino County Department of Public Social Services,

Respondents.

Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California

Respondent, Fred F. Thies, Director of the San Bernardino County Department of Public Social Services, a licensed adoption agency, respectfully prays that the Supreme Court deny a petition for writ of certiorari for review of the judgment of the California Supreme Court entered on February 20, 1980 denying petitioners' appeal from the decision of the Court of Appeal of the State of California, Fourth Appellate District, Second Division, filed November 29, 1979 and made final December 29, 1979.

Opinion Below.

Attached as Exhibit "A" to petitioners' petition for writ of certiorari.

Supreme Court jurisdiction is based upon 28 U.S.C. 1257(c) and is discretionary as to whether the court will grant a writ of certiorari to review a judgment of the Supreme Court of the State of California.

Questions Presented.

1. Whether foster parents with an expectation to be approved as adoptive parents have a right under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States to prior notice of the removal of a foster child when subsequent timely hearing and de novo judicial review are provided by state law.

2. Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States was violated by the San Bernardino County Department of Public Social Services, a licensed adoption agency, in determining the best interests of the child relinquished to it for placement by adoption.

3. Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States has been violated by California in the removal of a foster child whose custody rests in the adoption agency by state statute without appointing independent counsel for a three year old child.

Federal Question.

The federal question presented is whether or not the Due Process Clause of the Constitution of the United States requires in all cases prior notice to foster parents who have the expectation to adopt the foster child placed with them pursuant to agreement by an adoption agency when the agency determines that the best interests of the child will be served by removal from the foster home.

Legal Status of Petitioners Kelly and Kathy Marten.

Petitioners Kelly and Kathy Marten, then husband and wife, were foster parents to the child Sarah, who had been approved by the San Bernardino County Department of Public Social Services, a licensed adoption agency, for placement of the child. No petition for adoption had been filed by either of the petitioners Marten. The child was a relinquished child pursuant to California Civil Code Section 224m.

Statement of the Case.

Kelly and Kathy Marten, petitioners for certiorari to the United States Supreme Court, allege that they are "prospective" or "quasi-adoptive" parents of the child SARAH. This designation is incorrect. At no time did either Marten file a petition for adoption of the child. The legal status under the law of the State of California was that of foster parents; they were being considered as a possible adoptive placement for the child placed in their care.

In addition, the petition for certiorari at pages 4 and 5 failed to show the court the intensive social work performed by Social Worker Schneider, who made visits to the home on July 11, 1977, October 4, 1977, January 26, 1978 and April 5, 1978. Further, that Social Worker Schneider had visited the Marten's several times prior to approving them as applicants (for adoption) in January, 1976, and altogether had spent twenty (20) hours of intensive contact with the Marten's.

Social Worker Schneider interviewed the Marten's jointly on June 5, 1978 after Mrs. Marten returned to the State. The Marten's admitted to Mrs. Schneider at this time that they were having marital problems then, had had marital problems at the time SARAH was placed with them, and that they had been separated since January, 1978, and had no plan to seek marital counseling or to reconcile. Eva Schneider expressed to the Marten's her feeling that they had not honored their agreement with the Agency by reporting changes to the Agency, that they had thus acted dishonestly and that they had violated her trust in them for the sake of retaining physical custody of SARAH. The Marten's admitted that they had not informed the Agency of their changed situation out of fear that SARAH would be removed from them.

Eva Schneider advised the Marten's that she would have to seek consultation with her supervisors in the matter but *that removal of the child SARAH was a possibility at that time.*

Eva Schneider interviewed Mr. Marten alone on July 5, 1978. At that time he stated that if SARAH were to be removed from Mrs. Marten's home by the Agency, there would be no possibility of reconciliation, though he stated he loved Mrs. Marten. (Clerk's Transcript, pages 907 and 908.)

The County Adoption Agency thereafter sought a second opinion regarding the Marten's situation, and Mr. Bill Breer was assigned to review the matter. Mr. Breer was an adoption social worker with clinical experience in child psychology. He was of the opinion that the child SARAH suffered developmentally from the lack of a father figure in the home since January, 1978, and that greater difficulties would arise in the future due to this lack. Mr. Breer saw nothing to indicate that SARAH was physically suffering and he did say that SARAH appeared to be well cared for. Mr. Breer did apprise Mrs. Marten of the possibility that SARAH could be removed from her home, depending upon his recommendation.

Mr. Breer thereafter recommended that SARAH be removed from the Marten home based upon the foregoing observations, opinions and his professional judgment.

It was clear from the prior conduct of the Marten's in failure to inform the Agency of substantial difficulties in the placement and the removal of the child to one state while telling the Agency that the child was being taken to another state makes a reasonable conclusion that if prior notice of the action were given to the Marten's the substantial likelihood of their fleeing the jurisdiction and taking the child would be possible, if not probable.

A full and complete grievance review procedure held on September 11, 1978 (a copy of the Grievance Review De-

cision is attached as Appendix "A" and incorporated herein), wherein the Marten's were represented by counsel, ten (10) witnesses testified pursuant to Section 30684 of Title 22 of the California Administrative Code. The matter was thereafter taken on appeal by writ of administrative mandamus in Superior Court, wherein the court viewing the entire record found the findings of the review agent are supported by the weight of the evidence in the whole record; that the return of the child SARAH to petitioners would not be in the best interests of the child and, in fact, would be detrimental to the child; and that the court in exercising its independent judgment finds the findings of the review agent supported by the weight of the evidence submitted in the whole record.

Thereafter, petitioners sought appeal in the intermediate Appellate Court of the State of California. A copy of the opinion is attached as an appendix to petitioners' petition for certiorari in this court.

State Law.

The law of the State of California regarding the adoption of children relinquished to a licensed adoption agency is set forth in Section 224 et seq. of the California Civil Code. Section 224n of the California Civil Code reads:

> "The agency to which a child has been relinquished for adoption shall be responsible for the care of the child, and shall be entitled to the *exclusive* custody and control of the child at all times until a petition for adoption has been granted. Any placement for temporary care, or for adoption made by the agency, may be terminated at the discretion of the agency at any time prior to the granting of a petition for adoption. In the event of termination of any placement for temporary care or for adoption, the child shall be returned promptly to the physical custody of the agency."
>
> (California Civil Code 224n.)

California Civil Code Section 224n places the determination of removal of the child from a foster home which ex-

pects to adopt the child to the sound discretion of the adoption agency. This discretion is, of course, reviewable by judicial process under state law. *Rodriguez v. Superior Court,* 18 Cal.App.3d 510. Further, this concept of review by both administrative and judicial review is codified in California Administrative Code Title 22, Section 30684. (See Appendix 1 to petitioners's petition for certiorari.)

Full and independent judicial review by the Superior Court is authorized exercising its "independent judgment". See holding of C.V.C. v. Superior Court, 29 Cal.App.3d 909, 919. The courts of California exercised the power of review of the agency's discretion granted under Section 224n using the standard of the best interest of the child. See *Adoption of McDonald,* 43 Cal.App.2d 447, 458; *San Diego County Department of Public Welfare v. Superior Court,* 7 Cal.3d 1, 101 Cal. Rptr. 541; *Rodriguez v. Superior Court of Stanislaus County,* 18 Cal.App.3d 510.

California does provide substantial due process regarding the removal of a child from a foster home. In the case at bench a full and complete evidentiary hearing was completed and full independent review of the trial on the appellate level, ultimately the California Supreme Court refused to modify the opinion of the District Court of Appeal, who interpreting California Administrative law sustained the removal of the child on the grounds of imminent danger.

Justice Morris properly interpreted California Administrative Code 30684 when the issue of denial of due process was presented at the Court of Appeal. Here the Court said:

> ". . . The issue presented by the contention that the husband and wife were deprived of due process is whether there is substantial evidence to support the trial court's determination that the finding, that the Agency director had reasonable cause to believe the child was in 'imminent danger,' is supported by the weight of the evidence. We have concluded that there is.
>
> Husband and wife would have us define 'imminent danger' as 'immediate physical danger.' The term may not be so narrowly defined. The Administrative Code,

title 22, section 30684, subdivision (b) (2) defines the words 'Child in Imminent Danger' as 'A child whose health and safety are in jeopardy.' It seems clear that by so defining the term it was intended to include the 'risk' of injury or 'projected' danger as well as present or existing danger.

This is particularly so in view of the overriding statutory purpose of promoting the child's welfare. Where the agency reasonably believes that the child's health and safety would be endangered by prior notification of the agency's intent to remove the child, the agency is under a duty to withhold notification by reason of the overriding principle that it must act in the best interests of the child.

In this case the acting chief of adoptions presented the Agency's evaluation to Director Thies, and recommended that the child be removed forthwith, and that no pre-removal notice be given the husband and wife because to do so, in the Agency's judgment, would place the child in imminent danger because the wife was likely to flee with the minor child.

The evidence supporting the reasonableness of this belief consisted of: (1) the husband and wife's concealment of their marital differences in order to obtain the adoptive placement; (2) their failure to report their separation as required by their agreement with the Agency; (3) the wife's previous conduct in taking the child to an unauthorized destination out of state; (4) the wife's emotional instability and overdependence ont he child for her emotional needs; and (6) the fact that the fear of losing the child had been the stated reason for their untruthfulness and subterfuge. In view of this history the director's belief that the wife might flee with the child was clearly reasonable."

ARGUMENT.

I.

Foster Parents With an Expectancy to Adopt a Foster Child Do Not Have a Property Right Protected by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States Which Requires Prior Notice of the Removal of a Foster Child When Subsequent Timely Hearing and De Novo Judicial Review Are Provided by State Law.

The relationship between petitioners Marten and the child Sarah was initially created by the San Bernardino County Adoption Agency when, after study of the Marten's as a married couple living together, it was determined that the best interests of the child Sarah would be served by placement with the Marten's with the expectancy of a stable relationship between the couple and the creation of a permanent parent relationship by both parties with the child. It is clear that the adoption agency placing the child is bound by the statutes of the state and whatever rights the petitioners may have turns upon the law creating the placement.

This court has held that a mere expectancy does not create a "property" interest under the Fourteenth Amendment of the United States Constitution. See *Perry v. Sniderman*, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694, 2700.

The relationship of foster children and foster parents has been carefully reviewed by the Court in *Smith v. Organization of Foster Families for Equality and Reform*, 413 U.S. 816, 53 L.Ed.2d 14, 97 S.Ct. 2094, 2117 (1977). It seems clear from the *Smith* case that the United States Supreme Court is guided by the principle of law that the best interest of the child is considered paramount in the review of agencies decisions regarding placement and removal of children from their foster homes.

In the case at bench it cannot be argued that procedural due process was not provided under, first, administrative law, where petitioners were represented by an attorney at a timely hearing after the removal of the child, with a right to

judicial review and subsequent appealing to the highest court of the sovereign state. The issues of whether the whole record contained substantial evidence to support the judgment were clearly argued in the State courts, who found that substantial evidence supported the judgment of the agency that the best interest of the child would be served by removal from the home of Kathy Marten, and that the child would suffer detriment if required to remain in this broken home.

As in the *Smith* case, California confers the right on foster parents to adopt a child if the facts and circumstances demonstrate that the best interests of the child will be served by the completion of the adoption. In the case at bench, as indicated by the Court of Appeals, the child was used as a pawn between two parents seeking to hold a shaky marriage together rather than providing the child with a stable two-parent family wherein she could be raised in peace and security.

II.

Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States Was Violated by the San Bernardino County Department of Public Social Services, a Licensed Adoption Agency, in Determining the Best Interests of the Child Relinquished to It for Placement by Adoption.

Petitioners seek in the United States Supreme Court a review of the evidence produced at the administrative hearing and trial court int he guise of an alleged violation of the Fourteenth Amendment to the Constitution. The argument of whether substantial evidence exists in the whole record rests in the sound discretion of the trial and appellate courts in the sovereign state. It does not appear from the record that the California procedure of administrative and judicial review denied the right to present evidence, have counsel appointed, and confront witnesses, and this court has held that in such cases, the court should abstain from extending federal jurisdiction in such proceedings. *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669; *Moore v. Simms* _____ _____99 Sup.Ct. 2371, 2383; *Goldberg v. Kelly,* 397 U.S. 354 (1970).

Much of petitioners' request for certiorari argues the importance of the relationship between parent and child, and it is clear that this court leading the judicial system of this country has long recognized the need of a young child for a stable relationship with two parents living together for the maximum development of the child's potential to be a healthy and productive adult.

The records of all states contain legal chronicles of the tragedy to young children who are shuffled between conflicting parents with disputes over custody, visitation and child support. For this court to determine that the child Sarah's best interests will be served by making her the pawn in the shaky Marten marital relationship would indeed be a gross injustice to the child. The record in this case is clear that the decision to remove the child was not taken lightly but was carefully considered by representatives of the adoption agency with years of experience and training in dealing with delicate relationships of parent and child.

It is significant that the case of *C.V.C. v. Superior Court*, 29 Cal.App.3d 909 was argued extensively in the California Supreme Court who chose not to overturn the Fourth District Court of Appeal's decision.

III.

Whether the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States Has Been Violated by a California Adoption Agency in the Removal of a Foster Child Whose Custody Rests in the Adoption Agency by State Statute Without Appointing Independent Counsel for a Three Year Old Child.

It is fundamental to the concept of representation by an attorney of a client, that the client must be competent to make known his wishes to the attorney who has a duty under the cannons of ethics to present the client's position to the court. Under California law, Civil Code Section 224n, when a child is relinquished to an adoption agency, that agency has *exclusive* custody and control of said child and is charged with the duty to find the best home for that child that it can. It would indeed be ludicrous to determine that a

three year old child who barely puts sentences together must have "independent" counsel. The practical effect of such a required appointment, on constitutional grounds, of a lawyer who may not be trained or experienced in the needs, wants or desires of the child. Under state law the agency is bound to represent the child.

REASONS FOR DENYING THE WRIT.

1. **The decision below complied with the Due Process Requirement of the Constitution of the United States. The decision of the Fourth District Court of Appeal interpreting California Administrative Code Title 22, Section 30684, is binding upon the courts and administrative agencies of the State of California by the failure of the California Supreme Court to overturn or modify its decision. The interpretation made by the Court of Appeal clearly turns on the review and a practical answer to be used in the administration of government in this state. Had the California Supreme Court wished to change the interpretation of administrative law made by the Fourth District Court of Appeal in the case of Marten v. Thies, it had such an opportunity. By the failure to grant a hearing, the Court has made the opinions of the Fourth District Court of Appeal the law in this State.**

2. **To grant certiorari in this case would throw substantial doubt on the power of adoption agencies to carry out their functions to determine permanent and stable homes for young children. Petitioners seek to have the child Sarah adopted into a family broken by divorce, where the child Sarah will be subject to the decrees of visitation, custody, child support, the impact of the remarriage of Kelly or Kathy Marten, adjusting to new step-fathers and step-mothers, which has in the opinion of experts already caused substantial harm to the child by the lack of a father-figure in the home.**

Conclusion.

It is respectfully submitted that no violation of the Constitution of the United States has been committed. Therefore, it is respectfully requested that a writ of certiorari in the United States Supreme Court be denied.

August 20, 1980

Respectfully submitted,

ALAN K. MARKS
County Counsel

RICHARD WM. STRONG
Deputy County Counsel

Attorneys for Respondents

APPENDIX A
Grievance Review Decision
INTER-OFFICE MEMO

Date: September 13, 1978
From: GRIEVANCE REVIEW AGENT: Michael Dimitry
PHONE: 3780 Program Monitor, Administrative Research and Planning Unit (ARPU) Department of Public Social Services (DPSS)
To: FRED THIES, DIRECTOR, Department of Public Social Services (DPSS)

Subject: GRIEVANCE REVIEW HEARING: FINDINGS AND RECOMMENDATIONS

Attached are my findings and recommendations in the matter of the GRIEVANCE REVIEW HEARING of September 11, 1978: MARTEN, Kelly and Katherine versus the County Adoption Service (CAS).

GRIEVANCE REVIEW

Hearing Date: September 11, 1978

Grievance Review Agent: Michael Dimitry, Program Monitor, Administrative Research and Planning Unit (ARPU), Department of Public Social Services (DPSS): 670 E. Gilbert Street, San Bernardino, CA 92404. (714) 383-3780.

Hearing Site: Department of Public Social Services, Fontana District Office, 17830 Arrow Blvd., Fontana, CA 92335.

Principals Attending Hearing:

1. **Name:** Marten, Kelly. **Address:** 5393 Evart, Montclair, CA 91763. **Phone #:** (714) 686-9874. **Status:** Claimant: Putative Adoptive Father.
2. **Name:** Marten, Katherine. **Address:** 5393 Evart, Montclair, CA 91763. **Phone #:** (714) 686-9874. **Status:** Claimant: Putative Adoptive Mother.
3. **Name:** Beltran, Steven P. **Address:** Legal Clinic of Jacoby & Meyers, 344 N. Brand Blvd., Glendale, CA 92103. **Phone #:** (213) 723-4153 or (213) 244-4177. **Status:** Attorney for Claimants (DPA 19 on File).
4. **Tiffany, Leona. Address:** 1400 W. 13th St., Space 187, Upland, CA 91786. **Phone #:** None. **Status:** Grandmother of Kelly Marten.
5. **Name:** Morua, Seferina. **Address:** 564 Texas St., Pomona, CA 91766. **Phone #:** (714) 629-6181. **Status:** Mother of Katherine Marten.
6. **Name:** Pederson, Gary. **Address:** 670 E. Gilbert St., San Bernardino, CA 92404. **Phone #:** (714) 383-2620. **Status:** Acting Chief, County Adoption Services.
7. **Name:** Sansone, Tom. **Address:** 670 E. Gilbert St., San Bernaridno, CA 92404. **Phone #:** (714) 383-2220. **Status:** Child Welfare Services Supervisor I, County Adoption Services.
8. **Name:** Breer, Bill. **Address:** 670 E. Gilbert St., San Bernardino, CA 92404. **Phone #:** (714) 383-1820. **Status:** Social Service Worker V, County Adoptions Services.
9. **Name:** Schneider, Eva. **Address:** 325 E. "C" St., Ontario, CA 91764. **Phone #:** (714) 988-1065. **Status:** Social Service Worker IV, County Adoption Services.

Subject of Hearing: 20-month-old relinquished minor, SARAH KELLY MARTEN, residing since 8-21-78 in the licensed foster home of Bill and Marilyn Evans.
MINOR'S DATE OF BIRTH: 1-24-77
STATE NO.: SBER 12, 178 ADA
COUNTY NO.: 264661

Legal custody of the minor resides with the San Bernardino County Adoption Services.

Issues Involved: Generally, the issue is whether or not the San Bernardino County Adoption Service acted properly in removing the minor Sarah Kelly Marten from her adoptive foster placement with the Martens on August 21, 1978, within the purview of a.) applicable statutory and regulatory law; b.) San Bernardino County Adoptions Services Agency policy; and c.) professional social work practice.

Specifically, the issues become whether or not:

A. The Agency had reason to believe that Sarah Kelly Marten was in fact a "Child in Imminent Danger — A child whose health and safety are in jeopardy", as defined under California Administrative Code, Title 22, Section 30684: GRIEVANCE PROCEDURES; and therefore

B. The Agency did act properly in not notifying the Martens of its intent to remove the child prior to doing so.

C. The Agency lawfully and properly exercised its discretion, granted under Section 224n of the California Civil Code, in terminating the adoptive placement prior to the granting of a petition for adoption.

D. The Agency, in taking the action described under "C" above, caused the Martens to suffer a "grievous loss" without procedural due process, the "grievous loss" in this instance being the loss of opportunity to file a petition for adoption of the subject minor.

SUMMARY STATEMENT OF THE FACTS.

(The following summary is based solely on the evidence and sworn testimony presented at the Grievance Review Hearing held on 9-11-78; this Hearing was held in accordance with County Operations Manual Section 22-000.1 (eff. 7/74), and with Section 30684 of Article 9, Subchapter 2, Chapter 3, Subdivision 4, Part II, Division 2, Title 22 of the California Administrative Code.)

1. Kelly and Kathy Marten were approved by the Agency as prospective adoptive parents in January, 1976, after a lengthy applicant study process by Social Worker Eva Schneider.

2. The Martens were visited in March, 1977 for a routine "Annual Update" of their applicant status by Social Worker Eva Schneider.

3. The subject minor, Sarah Kelly Marten, was placed with the Martens on a "quasi-adoptive" basis on May 17, 1977; minor was 15 weeks old. This child had been relinquished to San Bernardino County Adoption Service by the natural mother on March 24, 1977, the natural father on May 27, 1977, and the presumed father on April 1, 1977. An acknowledgement of the filing of these relinquishments was sent to San Bernardino County Adoption Services on June 8, 1977, thereby making the child legally free for adoptive placement by the County Adoption Service. The County Adoption Services division thus was given sole legal custody of the minor.

   The Agency accepted the relinquishments from the natural mother with the tacit agreement that the child would be placed in a stable, two-parent family, this being the mother's intent in relinquishing the child.

4. This placement was legally formalized as an adoptive placement on June 28, 1977.

5. Mr. and Mrs. Marten were admittedly experiencing "marital problems" of an unspecified nature during the month of May, 1977, prior to the placement.

6. The Marten's relationship improved temporarily but then again deteriorated to the point that they announced to their families on Christmas Eve, 1977, that they were going to separate. This announcement spurred Mrs. Tiffany, Kelly's grandmother, to warn the Martens at that time that their separation could jeopardize the placement of Sarah with them, stating that the Agency might remove Sarah if the Martens separated.
7. Despite Mrs. Tiffany's warning, the Martens separated in January, 1978, and contrary to their agreement with the Agency, did not inform the Agency of this change in their situation. Neither did the Martens seek help, professional or otherwise, for their marital problems.
8. After their separation, the Martens each dated other partners, although Mr. Marten continued to support Mrs. Marten financially. At the time of the Grievance Review Hearing, Mr. Marten was co-habiting with another woman, with the announced intention of continuing to do so indefinitely.
9. Wally Jordahl, Child Welfare Services Supervisor I with the County Adoption Services in the Ontario District Office *and* Eva Schneider's immediate supervisor at the time, received a phone call from an anonymous woman on 4-27-78. The anonymous caller reported that the Martens were separated, that there was cause for concern regarding the care being given to the minor, and urged that a social worker investigate the situation. This anonymous phone call thus served to *initiate* the investigation by the County Adoption Services.
10. Mrs. Marten was out of the State at the time of the anonymous phone call; she had apparently gone to Nebraska instead of Texas as she had informed the Agency, and was therefore technically out of the State without the Agency's consent or knowledge. Her misdirection of the Agency was intentional although her motivation is unknown.

11. Social Worker Eva Schneider made her final visit to the Marten home prior to initiating the adoption petition on 4-5-78. This was her fourth visit (home visits 7-11-77, 10-4-77, 1-26-78, 4-5-78) and fifth interview with the Martens since she had placed Sarah with them. Eva Schneider had also visited the Martens several times prior to approving them as applicants in January, 1976, and altogether had spent 20 hours of intensive contact with the Martens.

12. Eva Schneider interviewed the Martens jointly on 6-5-78, after Mrs. Marten had returned to the State. The Martens admitted to her at this time that they were having marital problems then, had had marital problems at the time Sarah was placed with them, and that they had been separated since January, 1978, and had no plan to seek marital counseling or to reconcile.

    Eva Schneider expressed to the Martens her feeling that they had not honored their agreement with the Agency by reporting these changes to the Agency, that they had thus acted dishonestly, and that they had violated her trust in them for the sake of retaining physical custody of Sarah. The Martens admitted they had not informed the Agency of their changed situation out of fear that Sarah would be removed from them.

    Eva Schneider advised the Martens that she would have to seek consultation with her supervisors in the matter *but that removal of the child Sarah was a possibility at this point.*

13. Eva Schneider interviewed Mr. Marten alone on July 5, 1978; at this time he stated that if Sarah were to be removed from Mrs. Marten's home by the Agency there would then be no possibility of reconciliation even though he stated that he loved Mrs. Marten.

14. County Adoption Agency supervisors and DPSS Administration requested that a second opinion of the social situation involving Mr. and Mrs. Marten, and Sarah, be obtained.

15. Mr. Bill Breer was assigned to provide the second opinion; on 7-24-78 he interviewed Mrs. Marten in the course of arriving at his psycho-social assessment of the situation. His impression was that Mrs. Marten was somewhat depressed, suffered from a high level of anxiety, had an immense over-investment in the child Sarah as her only source of affection, and felt "abandoned" by Mr. Marten. He noted that she continued to display a passive acceptance of her situation and continued dependence on Mr. Marten for financial aid. Mrs. Marten had suffered, he felt, a loss of financial support from her relatives. Mr. Breer felt that Mrs. Marten's reality situation was continuing to deteriorate in view of her statement that Mr. Marten would not make the house payment any more, in her belief. Since the separation Mrs. Marten had managed on financial contributions from Mr. Marten, and small money contributions from a neighbor and money and food from her mother. Since the separation she had only managed to be employed for one week. Mr. Breer noted that Mrs. Marten had no visible means of support, no significant work history or marketable job skills, no eligibility for welfare (in response to her query), was facing a period of instability, and ran a real risk of entering a marginal life of poverty.

Mr. Breer felt that, in his opinion as an adoptions social worker with clinical experience in child psychiatry, the child Sarah had suffered developmentally because of the lack of a father figure in the home since January, 1978, and that greater difficulties would arise in the future due to this lack. Mr. Breer saw nothing to indicate that Sarah was physically suffering or that she was in immediate danger; he did say that Sarah appeared well-cared for. Mr. Breer felt that Mrs. Marten displayed a lack of foresight, and was unrealistic in appraising her situation. Mr. Breer did apprise Mrs. Marten of the possibility that Sarah could be removed from her home, depending partially on his recommendation.

Mr. Breer ultimately did recommend that Sarah be removed from the Marten home based on the foregoing observations, opinions and professional judgements.

16. On August 21, 1978, social worker Eva Schneider and her supervisor Tom Sansone removed the child Sarah Kelly Marten from the home of Katherine Marten and placed her in a foster home pending re-placement in another adoptive home.

The child was removed under authority of California Civil Code Section 224n; no prior notice was given to the Martens as it was believed by the Agency that to do so would place the child in imminent danger.

This action was taken after the assessment of the case situation by Mrs. Schneider and Mr. Breer, and after presentation of their evaluation to the immediate supervisor, Mr. Tom Sansone, the Acting Chief of Adoptions, Mr. Gary Pederson, and the Special Services Programs Division Chief, Mr. T. Michael Decker. These latter individuals agreed that placement of the child Sarah was sufficiently deficient in several areas to warrant her removal from the Martens:

a.)The placement did not meet the Agency's perceived commitment to the natural mother to place Sarah with a *two-parent* family, the intent being that the two parents would reside together in a stable relationship and raise the child to the age of majority;

b.)The placement did not appear to be in keeping with Section 30627(c) of Title 22 of the California Administrative Code which clearly gives preference to two-parent families over single parent families in terms of accepting application for adoption and, in the Agency's interpretation, preference for placing children with two-parent families over single parent families, whenever possible;

c.)The placement did not have sufficient supports and resources to meet the child's continuing physical and emotional developmental needs.

The Acting Chief of Adoptions, Mr. Gary Pederson, presented the Agency's evaluation to the Director of the Department of Public Social Services, Mr. Fred F. Thies, and recommended that the child be removed forthwith, and further, that no notice of the removal be given to the Martens because to do so, in the Agency's belief and judgment, would place the child in imminent danger by virtue of the likelihood of Mrs. Marten to flee with the minor Sarah Kelly Marten.

Mr. Thies, based on the substantial weight of the evidence presented to him by the County Adoptions Services, found the child would be placed in imminent danger if notice were to be given, and formally directed that the child be removed from the Martens and that the Martens release the child to representatives of the County Adoption Service, in accordance with Section 224n of the California Civil Code.

17. On August 31, 1978, Kelly and Katherine Marten requested a Grievance Review Hearing by delivering a CWS/CAS-3 (7/74) "Request for Grievance Review" to the San Bernardino County Department of Public Social Services, and a Grievance Review Hearing subsequently scheduled and held on September 11, 1978.

FINDINGS.

The following findings are presented in the context of Section 30684 of Title 22 of the California Administrative Code, which requires that:

> All issues shall be considered in the best interests of the child.

All parties to the Grievance Hearing agreed at the beginning and at the close of the Hearing that the paramount concern was the well-being and best interests of the child, Sarah Kelly Marten.

A. Based on all the testimony and evidence given at the Grievance Review Hearing, it is found that the County Adoptions Services and the Director of the Department of Public Social Services, had sufficient and substantial cause to believe that the

child Sarah Kelly Marten was a child whose health and safety were in jeopardy, and that she was therefore in imminent danger; further, that the jeopardy would greatly increase were prior notice of the child's removal to be given to the Martens.

It seems clear that *in the absence of a filed petition for adoption,* that both Section 30684 of Title 22 of the California Administrative Code and Section 224n of the California Civil Code grant discretionary power to the Adoption Agency to determine if a child is in "imminent danger" or not, and to terminate the child's placement, or not. In the present case it was the individual and collective expert judgement of the Agency, acting in accordance with its practiced wisdom, that led it to believe Sarah Kelly Marten was in "imminent danger" and that her placement must then be terminated without notice. "Imminent danger" does not mean *necessarily* "immediate" danger, but carries the connotation of "projected" danger as well. It seems clear that both interpretations were intended in the construction of Section 30684; otherwise the word "immediate" would have been used instead of "imminent". The Agency's interpretation of "imminent danger" was therefore reasonable and correct, as was the subsequent action that it took based on this conclusion.

The Agency msut be guided in all its actions by the principle of doing that which is in the best interests of the child — that which will best meet the needs of the child, those needs being emotional, developmental, and physical. The Agency therefore has a *clear duty* to take steps to rectify any conditions or situation which does not meet the needs of the child, or is, or *could become,* detrimental to the child's well-being. The Agency can only accomplish this duty by exercising its

powers of judgment and discretion in *good faith* on behalf of the child, the child being the Agency's *primary client* in all such instances. It is found in the present instance that the Agency did indeed exercise its judgment and discretion in good faith.

B. Once the Agency has reached the conclusion that the child is in "imminent danger", or that the child could be placed in "imminent danger" by virtue of prior notification of the Agency's intent to remove the child, the Agency *is required* to withhold notification by the over-riding principle that it *must do* that which is int he best interests of the child. It would obviously not be in the best interest of the child to be placed in a situation of *increased* "imminent danger".

The interests of all parties are protected by the requirement that it is *the Director* who makes the finding of "imminent danger" or not, and consequently of notification or not, based on the weight of the evidence presented to him. The interests of the Martens were therefore considered regarding notification.

Therefore the Agency did act correctly within the law, Agency policy, and professional social work practice in withholding notification of the intended removal of the child, Sarah Kelly Marten, from the Marten home.

C. Section 224n of the California Civil Code is explicitly clear on the right of the Adoption Agency to remove a child *at its discretion* any time prior to the granting of a petition for adoption. No administrative hearing is required unless the child is considered to be in "imminent danger", and no judicial hearing is required in any case where a petition has not been filed.

It seems clear that the Agency lawfully and properly exercised its discretionary power granted by Section 224n of the California Civil Code.

D. The core of the Martens' arguments against the actions taken by the County Adoption Agency is that they have suffered a "grievous loss" without procedural due process because the agency removed the child from their home, and because the Agency did not notify them of its intent to do so. The Martens assert that the "grievous loss" is compounded by their biological inability to bear children. They further asert that removal of the child from them has caused her emotional injury because of the precipitous separation from her parents.

The Martens argue that their right to an administrative hearing was abrogated by the action of the Agency, and that the actions taken by the Agency in removing the child Sarah Kelly Marten were motivated only by "administrative convenience" and not by the concern of the Agency for the child or for them, and that the actions were arbitrary.

The weight of the evidence supports the argument that the action taken by the Agency in removing the child from the Martens was *not* precipitous, and that the withholding of notification was not arbitrary, but rather motivated by the overriding concern of the Agency for the well-being and protection of the child.

The Martens arguments expressing their concern that separation of the child from them by the Agency has and will cause the child "irreparable injury" are negated by their own actions in January 1978, when Mr. Marten left the home. His departure in itself constituted a separation trauma for the child; maintenance of the separation with *no* action taken by the Martens to resolve their marital problems indicates an immature and callous disregard for the emotional developmental needs of Sarah Kelly Marten, the Martens protestations not withstanding. Mr. Marten's

living arrangement with his paramour at the time of the Hearing, and his avowed intention of continuing to do so, speak eloquently to this point.

The argument that the Agency undertook the removal of Sarah Kelly Marten without a prior administrative hearing and without notification of intent merely as an "administrative convenience", is spurious. It was clearly shown that the Agency, because of the gravity of the contemplated action, went to great lengths to assess the situation before taking what it considered to be drastic and irrevocable steps to insure the well-being of the child, not only in the immediate future, but for the child's life to the age of majority. There were several case consultations between the assigned social worker and her supervisor, the Acting Chief of Adoptions and the Director, and with another social worker, Mr. Breer, who was requested to provide a second, objective assessment and recommendation based on a review of the case record and an interview with Mrs. Marten.

The Agency first began contemplating removing the child on 6-5-78 when Mrs. Schneider interviewed the Martens jointly; she informed the Martens then of this possibility. Mrs. Schneider again warned Mr. Marten on July 5, 1978 of this possibility. Mr. Breer advised Mrs. Marten of this possible eventuality on July 24, 1978 when he interviewed her. The Martens clearly had intimations of the impending removal of the child.

Based on the findings previously stated that the Agency properly and correctly acted on its judgment that the child was in "imminent danger", the argument that the Martens were deprived of procedural due process is negated, *especially* in the absence of the filing of a petition for adoption.

The Martens' concern over their "grievous loss" and "deprivation without due process" is curious in the light of the fact that they themselves took no action to protect their interest in the child. Had they simply filed a petition for adoption of the child their interests, in their view, could have been subjected to an independent judicial review *prior* to any removal of the child. The Martens consulted an attorney, Mr. James Banks, but took no action. In fact, the Martens could conceivably have filed a petition as early as December, 1977, but instead chose to announce their imminent marital separation at that time.

Any reasonable and prudent person would have taken some steps to protect his interests against grievous loss but the Martens chose only to willfully withhold from the Agency information regarding their separation and to continue to intentionally deceive the Agency for six months — until 6-5-78; this deception indicates a knowledge by the Martens that they were aware that their interest in the child could be threatened if the Agency found out. And yet they took no action — neither to resolve their situation nor to protect their interest in the child by filing a petition for adoption.

Thus it is found that the Martens were not denied an opportunity to file a petition of adoption for this child by the action of the Agency, nor did they suffer a "grievous loss" thereby; opportunity existed in plenty for the Martens prior to the Agency action on 8-21-78.

The Agency has announced its willingness to accept and consider an application by Mr. and Mrs. Marten for a single parent adoptive placement for a child ten years of age or older.

It is the intent of the County Adoption Services to re-place Sarah Kelly Marten in another two-parent, stable family home as the Agency feels very trongly that *this* is in the best interest of the child.

It is the finding of this Grievance Review Agent that it is *the child* Sarah Kelly Marten, as is so often the case, who has suffered a tragic loss of almost nine critical months of her development due to the separation of the Martens; and it is *the child* who must bear the trauma of separation and replacement because of the unrealistic and irresponsible actions of Mr. and Mrs. Marten.

RECOMMENDATIONS.

It is respectfully recommended that:

A. The Director of the San Bernardino County Department of Public Social Services uphold the findings detailed above, and that

B. The County Adoption Services continue to offer either direct services or referral to appropriate counselling services to Mr. and Mrs. Marten, unless such services are explicitly refused by the Martens, and that

C. Such offer of services be accomplished through the person of a new social worker heretofore not connected with this case.

Respectfully submitted,

Mr. Michael Dimitry
Program Monitor
Administrative Research and Planning Unit

Reviewed and Approved:

Fred F. Thies, Director
Department of Public Social Services

ATTACHMENT VII.

30679. Referrals. Data on children ready for placement shall be entered in the referral system for matching. Printed possible referrals of applicants for children and of children for applicants shall be forwarded to agencies by the referral system. Action shall be taken and reports sent to the ARRC by agencies within the time limits established by the State Department of Health.

History: 1. Amendment filed 2-8-78; effective thirtieth day thereafeter (Register 78, No. 6).

30681. Discontinuance Notifications. The agency shall discontinue the registration immediately when a placement is made or a child or applicant is no longer available for another reason. Discontinuance forms will be provided by ARRC.

History: 1. Amendment filed 2-8-78; effective thirtieth day thereafter (Register 78, No. 6).

30683. Cooperation With Adoption Resource Exchange of North America. California applicants have priority for palcement of California children. Cooperative placements through the Adoption Resource Exchange of North America may be considered if no home is available in California for a child or if there is no child for an applicant.

History: 1. Amendment filed 2-8-78; effective thirtieth day thereafter (Register 78, No. 6).

Article 9. Grievance Procedures — Relinquishment Adoption Program

30684. Grievance Procedures. (a) Each public and private licensed adoption agency shall make provision for the review of complaints by adoptive parent(s) as related to the placement, care, or removal of children from an adoptive home. All issues shall be considered in the best interests of the child.

(b) **Definitions.**

(1) **Grievance** — A grievance is a complaint or expression of dissatisfaction about procedures or actions taken by an adoption agency relating to an adoptive home placement.

(2) **Child in Imminent Danger** — A child whose health and safety are in jeopardy.

(3) **Grievance Review Agent** — A person or panel designated by the director of the local agency to conduct the grievance review and render a recommended decision to the director of the agency.

The agent need not be employed by the agency but shall be:

(A) Person(s) not involved in the action complained of,

(B) Person(s) not directly in the chain of supervision of any of the persons involved in the action complained of, with the exception of the director or his chief deputy, and

(C) Person(s) knowledgeable of the field and capable of objectively reviewing the agency action complained of.

(4) **Parties to Grievance Review** — The adoptive parent(s) requesting the review and the agency responsible for the action complained of.

(5) **Adoptive Parent(s)** — Person(s) with whom a licensed adoption agency in California has placed a child for adoption and for whom an adoption petition has not been filed.

(6) **The Representative** — An individual, including an attorney at law, relative, friend, or other person authorized in writing by the complainant or by the agency to act for and represent a party to the review in any and all aspects of the hearing.

(c) **Notification of Grievance Review Procedures.**

(1) Adoptive applicants shall be informed during the home study that in the event there is dissatisfaction with an administrative action taken by the agency after the placement of a child in the home they have a right to a grievance review.

(2) Adoptive applicants shall be given a copy of the agency procedures during the home study.

(3) The adoptive placement agreement shall include a statment referring to the rights to a grievance review.

(d) **Notification of Intent to Move Child.**

(1) **Advance Notice Requirements.** The adoptive parent(s) shall have not less than seven calendar days' written notice of the agency's intention to remove a child placed in the home. The exceptions are when:

(A) The agency director has reasonable cause to believe the child is in imminent danger, the child may be removed without prior notice but within seven days written notice shall confirm reasons for removal, or

(B) The agency and adoptive parent(s) by mutual agreement approve removal of the child.

(2) The notice shall contain the date of the intended removal, the reasons for the removal, and the right to a hearing prior to removal as provided in Section "F" of these regulations.

(e) **Persons Entitled to Grievance Review.**

(1) Any adoptive parent(s) dissatisfied with any agency action relating to a child placed in his home for adoption and for whom an adoption petition has not been filed may request a review of the agency decision.

(2) **Exceptions.** No grievance review under this procedurel be granted on the following cases.

(A) The removal of a child resulting from a court order.

(B) A complaint involving only a question regarding the validity of a law or departmental regulation.

(C) Any issue for which a fair hearing is available pursuant to Welfare and Institutions Code Sections 10950 through 10963.